No. 06-766

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In The
Supreme Court of the United States

NEW YORK STATE BOARD OF ELECTIONS, *et al.*,

Petitioners,

v.

MARGARITA LÓPEZ TORRES, *et al.*,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Second Circuit

REPLY BRIEF FOR PETITIONERS NEW YORK COUNTY DEMOCRATIC COMMITTEE, NEW YORK REPUBLICAN STATE COMMITTEE, ASSOCIATIONS OF NEW YORK STATE SUPREME COURT JUSTICES IN THE CITY AND STATE OF NEW YORK, HONORABLE DAVID DEMAREST, J.S.C.

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PRELIMINARY STATEMENT

Fundamentally, Respondents have a flawed vision of the First Amendment that would mandate that rank-and-file voters be given the right to vote for candidates directly at the nomination phase – a requirement that could only be satisfied with a direct primary or its functional equivalent. In light of *American Party of Texas v. White*, 415 U.S. 767 (1974), and this country's rich history of conventions which well establish that there is no constitutional right to a primary, Respondents' vision is nothing more than a policy preference best left to the State Legislature to consider.

Respondents' central complaint throughout the case has been that New York's judicial convention system is controlled by political parties and their leaders to the exclusion of rank-and-file members. Yet in their brief, Respondents suddenly wish to pretend that party conduct is not at issue so that they can justify the application of strict scrutiny to New York's convention system rather than a balancing test that takes into account the countervailing constitutional rights of the parties. Thus, Respondents argue that because the judicial nominating process is based upon a statutory framework, all conduct by the parties undertaken to effectuate the nominating process loses its First Amendment protection. But, as this Court recognized in *California Democratic Party v. Jones*, 530 U.S. 567 (2000), even where an election is a state-run process, "when the election determines the party's nominee, it is a party affair as well." *Id.* at 573 n. 4.

In an effort to expand the scope of First Amendment rights, Respondents argued below, and the Second Circuit agreed, that the convention system severely burdens the First Amendment rights of challenger candidates within a party by depriving them of a "realistic opportunity" to vie for nominations against candidates backed by party leaders. *See* Pet. App. 41-44.[1] But as the undersigned

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[1] "Pet. App. __" refers to the Appendix to the Petition for Certiorari; "JA __" to the Second Circuit Joint Appendix; "HE __" to Volumes 1-9 of

(Continued on following page)

Petitioners detailed in their Opening Brief,[2] this standard rests on a distortion of the "reasonably diligent independent candidate" test in *Storer v. Brown*, 415 U.S. 724, 726 (1974), which applies to minor parties and independent candidates, not intraparty contests. *See* Pet. Br. at 23-27.

Faced with this argument, Respondents' brief all but abandons the effort to defend the "realistic opportunity to participate" standard which was the core thesis of the Second Circuit's decision. Instead, at this rather late stage in the case, Respondents craft a new framework in which they artificially cleave the right to associate into (i) the right of party rank-and-file to associate with one another, and (ii) the right of party rank-and-file to associate with judicial candidates. Resp. Br. at 17-18. But the very cases they rely upon, *Jones*, *Tashjian v. Republican Party of Connecticut*, 479 U.S. 208 (1986), and *Eu v. San Francisco County Democratic Central Committee*, 489 U.S. 214 (1988), actually uphold the rights of parties to dictate the terms of their own association without any requirement of direct participation on the part of the rank-and-file. In reality, Respondents claim that candidates are denied access because they rarely *succeed* in being considered by voters at the nomination stage, again revealing that Respondents will be satisfied by nothing short of direct, unmediated access between candidate and voter.

Finally, Respondents make no attempt to reconcile their flawed vision with this Court's holdings in *White*, *Cousins v. Wigoda*, 419 U.S. 477 (1975) or *Democratic Party of the United States v. Wisconsin ex rel. La Follette*, 450 U.S. 107 (1981), which establish that true, delegated-mediated nomination systems such as New York's can be constitutional. When considered from the proper perspective of each participant's intended role in the process, rather than Respondents' skewed view, all of the various participants have access to the system and the burdens on the right to vote are slight. Rank-and-file voters have the unfettered

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the Second Circuit Record on Appeal; and "Tr. __" to Volume 10 of the Second Circuit Record on Appeal.

[2] Hereinafter cited as "Pet. Br. at ___."

right to vote for delegates to act as their representatives and that ability to cast a delegate ballot fully vindicates voters' First Amendment rights. *See Cousins*, 419 U.S. 477.

I. THE POLITICAL PARTIES HAVE FIRST AMENDMENT RIGHTS IN THE CONVENTION SYSTEM WHICH PRECLUDE THE USE OF STRICT SCRUTINY IN THIS CASE

After arguing to the lower courts for the past three-and-a-half years that New York's judicial convention system is unconstitutional for the very reason that it is dominated by party leaders and disadvantages "challenger candidates" who do not control the "vast party machine," Respondents now argue to this Court that this case does not involve party activity at all. Respondents' abrupt about-face is a strained effort to avoid a collision course with the First Amendment rights of political parties that are inextricably bound up in the delegate and candidate selection process. As Respondents recognize, if the First Amendment rights of political parties are implicated, then the one-sided strict scrutiny analysis the Second Circuit employed to reach its determination of unconstitutionality would not apply. *See, e.g.*, Brief for Respondents (hereinafter "Resp. Br.") at 38 ("the more relaxed level of scrutiny that might apply to a nomination process autonomously chosen by a political party with the consent of its members is simply not applicable here"). Thus, Respondents claim that "this case does not implicate the private organizational choices of a political party," *id.* at 33, but instead merely involves state-mandated action imposed on all political parties.

Respondents cannot shunt aside the independent constitutional rights of the political parties by suddenly choosing to ignore the beehive of party activity surrounding this nominating system. The judicial convention system directly involves not only party rules, which among other things determine the number of delegates required but also a broad array of classic party associational conduct

protected under the First Amendment. This conduct includes, for example, fielding delegates, circulating petitions, endorsing candidates and gathering at the convention to deliberate and select nominees. Because the parties' associational freedoms are at stake, the Court should balance the relative constitutional rights of rank-and-file voters that are allegedly infringed by the convention system against the co-equal rights of the parties that would be infringed by the mandatory installation of a primary in lieu of the convention system.

A. THE FIRST AMENDMENT ASSOCIATIONAL RIGHTS OF POLITICAL PARTIES ARE AT STAKE IN NEW YORK'S JUDICIAL CONVENTION SYSTEM

Respondents do not deny that political parties have First Amendment rights, among them the right to organize themselves as they see fit to pursue their political goals. *See Eu*, 489 U.S. at 229 ("As we noted in *Tashjian*, a political party's 'determination . . . of the structure which best allows it to pursue its political goals, is protected by the Constitution'") (citing and quoting *Tashjian*, 479 U.S. at 224); *Timmons v. Twin Cities Area New Party*, 520 U.S. 351, 358 (1997) ("political parties' government, structure, and activities enjoy constitutional protection") (citation omitted). Nor do Respondents dispute the lawful right of party leaders to act on behalf of the party. *See Eu*, 489 U.S. at 229-30 (upholding right of party leaders to endorse candidates); *see also Tashjian*, 479 U.S. 208 (upholding right of party leadership to open party primary to independent voters); *La Follette*, 450 U.S. 107 (upholding right of party leadership to determine makeup of State's delegation to party national convention). Indeed, it is the simple reality of politics that party leaders organize rank-and-file members, set party goals and support candidates who best advance those goals and the interests of the party in general. *See Eu*, 489 U.S. at 230 (noting political party's "discretion in how to organize itself, conduct its affairs, and select its leaders"). Instead, what Respondents argue is that the First Amendment associational rights of political parties are simply not implicated here

because this case does not involve the autonomous choices of political parties pursuant to their own party rules, but rather conduct mandated by statute. *See* Resp. Br. at 33.

As an initial matter, Respondents have the facts wrong. This case does involve party rules. The text of the challenged statute, N.Y. Elec. L. § 6-124, expressly vests authority in the political parties to establish rules governing important aspects of the judicial nominating convention. The number of delegates to New York's judicial convention – crucial to the Second Circuit's decision – is established by party rule, not statute. *See id.*; *see also* JA 14 (Cmplt. ¶ 35) ("The Election Law grants to the political parties substantial control over the number of delegates"). Party rules also govern determination of the geographic scope of assembly districts in cases of districts comprised of all or part of two or more counties. *See* N.Y. Elec. L. § 6-124. In addition, party rules determine how party officers, county leaders and party chairpersons are chosen, their respective responsibilities, the organization of party judicial screening panels, and restrictions on whom party leaders may endorse for judicial office. *See* HE 22-30 (NYCDC Rules, Art. II & III).

Even where conduct by party leaders is not codified by a party rule, the conduct of those leaders is nonetheless party activity. *See, e.g., Eu*, 489 U.S. at 230. Respondents cite no case suggesting otherwise. Indeed, under this Court's decision in *Eu*, the aspect of the convention system that Respondents have found most objectionable – in essence, that party leaders recommend candidates to the convention delegates which the delegates typically accept – constitutes classic party activity protected by the First Amendment. *Id.* at 214; *see also* Resp. Br. at 34 (characterizing the nomination process "as a rubber stamp for a party leader"); *id.* at 38 ("the state-mandated nominating process prevents any challenges to . . . leaders' choices"); *id.* at 39 (arguing that "the State insulates the choices of party leaders"). *Eu* struck down California's statutory ban on party endorsements – the functional equivalent of recommending judicial candidates to delegates – as a violation of the associational rights of the party, without

reference to whether the party had promulgated a rule authorizing such endorsements.

In addition, Respondents wrongly assume that the mere existence of a statutory election scheme means that the conduct of parties and their leadership within its ambit is not private party activity.[3] As this Court recognized in *Jones*, even where an election is a state-run process, "when the election determines a party's nominee, *it is a party affair as well.*" 530 U.S. at 573 n. 4 (emphasis added). Party conduct within the electoral scheme is protected by the First Amendment. *See id.* at 573 ("we have continually stressed that when States regulate parties' internal processes they must act within limits imposed by the Constitution"); *Eu*, 489 U.S. at 229-33 (direct regulation of party leaders and internal party governance subject to strict scrutiny).

Prior to their Opposition Brief, Respondents themselves recognized that the operation of the convention process is rife with party conduct that is not dictated in any way by the challenged statutes. *See, e.g.*, JA 17; Respondents' Brief in Opposition to Writ of Certiorari at 2 ("This case requires us to peer inside New York State's political clubhouses and determine whether party leaders have arrogated to themselves a choice that belongs to the people") (quoting Pet. App. 5). As the district court stated, "the heart of this case is the plaintiffs' claim that county leaders, along with district leaders, decide who becomes a Justice of the Supreme Court." Pet. App. 135. The record is also replete with evidence of how local political clubs and county committee organizations field delegate candidates to run in primaries.[4] Party leaders organize the convention process, and, as the district court found, the

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[3] Indeed, parties themselves are creatures of state statute inasmuch as they must satisfy qualifying criteria to be recognized as a political party under state law. *See* N.Y. Elec. L. § 1-104(3) (defining "political party").

[4] *See* JA 1994-95; *see also* Tr. 1354:13-20 (Ward); Tr. 165:10-20 (Berger); Tr. 1557:20-1558:24 (Kellner); Tr. 1942:13-17 (Levinsohn); Tr. 1984:6-22 (Giske); Tr. 2085:8-19 (Connor).

party assembles a "package" or slate of candidates to recommend to the convention delegates.[5] *Id.* 114. All of this classic party activity is completely autonomous of the challenged statutes and, thus, merits First Amendment protection.

B. BECAUSE PARTY RIGHTS ARE AT STAKE, A FLEXIBLE BALANCING TEST – NOT STRICT SCRUTINY – SHOULD APPLY TO THE EXTENT THE NOMINATING CONVENTION BURDENS THE RIGHT TO VOTE

Because the First Amendment rights of political parties are undeniably implicated in this case, a flexible balancing test rather than strict scrutiny analysis should apply to the extent the right to vote is burdened. Respondents deride this test as "standardless." Resp. Br. at 33. This Court, however, has applied a flexible balancing approach in many cases where competing constitutional rights are implicated, including First Amendment rights in the election context. *See Nixon v. Shrink Mo. Gov't PAC*, 528 U.S. 377, 402 (2000) (Breyer, J., concurring); *see also* Pet. Br. at 33-34 (discussing Supreme Court cases applying flexible balancing approach). And Respondents make no effort to dispute that New York's judicial convention system would easily pass constitutional muster under such a balancing test. Instead, Respondents ask this Court to indulge the fiction that the First Amendment rights of political parties are not at stake.

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[5] While Respondents portray this conduct as nefarious, it is the function of political party leaders to identify desirable candidates and rally behind them to advance the party's goals of winning elections and achieving broad support. Because there are typically multiple judicial vacancies, New York's judicial convention system affords party leaders and delegates a unique associational opportunity to engage in "logrolling" or strategic bargaining to balance slates of judicial candidates that reflect their diverse interests. *See* Tr. 2121:5-14, Tr. 2103:25-2104:25 (Connor); *see also* Tr. 1574:14-1575:4 (Kellner); JA 367-68 (Kellner Decl. ¶ 28); Tr. 1989:18-1993:16 (Giske); JA 380-81 (Ward Decl. ¶¶ 13-17); JA 348 (Levinsohn Decl. ¶¶ 23-25).

Respondents also attempt to distinguish the trio of court of appeals decisions applying a balancing test in the convention context – *Ripon Society, Inc. v. National Republican Party*, 525 F.2d 567 (D.C. Cir. 1975), *Bachur v. Democratic National Party*, 836 F.2d 837 (4th Cir. 1987) and *LaRouche v. Fowler*, 152 F.3d 974 (D.C. Cir. 1998) – on the grounds that they involved "challenges to the autonomously adopted internal rules of the national parties." Resp. Br. at 33. But Respondents' proffered distinction rings hollow. As discussed above in Section I.A, significant aspects of New York's judicial convention system are determined by party rule. Moreover, Respondents' distinction "between a system voluntarily adopted by the national political parties and one imposed by state law," *see id.* at 34, rests on isolated snippets from those cases. None of the circuit courts remotely suggested that such a distinction was relevant to their decision to apply a flexible balancing test rather than strict scrutiny.

Even the Second Circuit recognized that political parties have First Amendment rights under New York's electoral scheme, albeit under a one-sided application of the test set forth in *Anderson v. Celebrezze*, 460 U.S. 780 (1983). *See* Pet. App. 71 ("under New York's scheme, parties do retain the right to select a preferred candidate and advocate on her behalf, and we agree that protecting those rights is a compelling state interest. . . .") (citation omitted). Thus, even if the burdens associated with the convention system were significant (which they are not), Respondents cannot avoid the application of the balancing test by, to use Respondents' own word, "pretending" that the First Amendment associational rights of political parties are *not* implicated by this case. *See* Resp. Br. at 18.

II. THE FIRST AMENDMENT DOES NOT GUARANTEE A RIGHT TO A PRIMARY OR A RIGHT TO WIN, BUT, AT MOST, MERELY ACCESS TO THE NOMINATING PROCESS

In their endless search for doctrinal support for their misguided vision of the First Amendment, Respondents offer a new framework for assessing the alleged burdens associated

with the convention system that divides the right to associate into (i) the right of party rank-and-file to associate with one another, and (ii) the right of party rank-and-file to associate with judicial candidates. Resp. Br. at 17-18. With respect to the right of party rank-and-file to associate with one another, Respondents argue that, under *Jones*, *Tashjian* and *Eu*, the challenged statutes infringe upon party members' right to associate with each other by "eliminating" their ability to influence the party's choice of nominee, thus, "depriving" them of a voice in the nominating process. *Id.* at 17; *see also id.* at 22. With respect to the right of party rank-and-file to associate with candidates, Respondents argue that, under *Bullock v. Carter*, 405 U.S. 134 (1972) and *Lubin v. Panish*, 415 U.S. 709 (1974), strict scrutiny applies here in light of the purported "evidence" of "exclusion" of challenger candidates from consideration by party members. *See* Resp. Br. at 29-30. Of course, the basis for Respondents' belief that challenger candidates are "excluded" from the convention is the Second Circuit's improper application of the *Storer* test. But neither of the purported lines of associational rights cases nor *Storer* remotely supports their view of the scope of the right at issue here. Ultimately, Respondents' arguments reduce to the same value judgment, *i.e.*, that rank-and-file members should have their direct, unmediated preferences fulfilled in the selection of candidates.

A. THE JUDICIAL NOMINATION SYSTEM DOES NOT ABRIDGE THE PURPORTED RIGHT OF THE PARTY RANK-AND-FILE TO ASSOCIATE WITH EACH OTHER

Relying on *Jones*, *Tashjian* and *Eu*, Respondents claim that the convention system abridges the right of party members to associate with each other because the statutes "effectively requir[e] political parties to fence out their rank-and-file members, leaving them with no voice in the parties' nomination processes." *Id.* at 22. But the party does not eliminate any members from the convention process. Instead, all rank-and-file members have a right to participate in the nominating process by electing judicial

delegates. *See Cousins*, 419 U.S. at 489 ("respondents overlook the significant fact that the suffrage was exercised at the primary election to elect delegates"). Respondents ignore the intended role of the party rank-and-file within the convention system – to elect delegates – in favor of the role Respondents wish them to have – to elect judicial candidates directly. Respondents claim that the party rank-and-file have been "fenced out" of the convention process because they fully assume their own conclusion – namely, that there is a constitutional right to a primary – and distort *Jones*, *Tashjian* and *Eu* to support it.

Arguing primarily by way of analogy to this Court's decision in *Jones*, Respondents assert that the challenged statutes eliminate the ability of party rank-and-file to influence the party's choice of nominee, and, thus, create a risk that the party will be forced "'to give their official designation to a candidate who is not preferred by a majority or even plurality of party members.'" Resp. Br. at 22 (quoting *Jones*, 530 U.S. at 579). But *Jones* only makes sense in the factual context of that case, which involved a direct primary. In *Jones*, California's blanket primary law mandated that non-members of political parties be allowed to vote in party primaries, and, thus, raised the very real danger that the nominee might not reflect the direct preferences of party members, even though the system was designed to do so. 530 U.S. at 567. *Jones* in no way supports the notion that party nominees must always reflect the direct preference of all or a majority of party members regardless of the electoral system the state has enacted.

Indeed, Respondents make no attempt to reconcile their interpretation of *Jones* with *Cousins* and *La Follette*, where this Court recognized that popular support for a candidate need not be determinative of the outcome of a nomination process. *See* Pet. Br. at 21. *Cousins* and *La Follette* are dispositive of Respondents' arguments as these cases establish that, in exercising their First Amendment rights, parties can "fence out" rank-and-file voters by choosing their own delegates and giving those delegates the right to disregard the preferences of the majority. *See Cousins*, 419 U.S. at 480 (upholding the seating of a slate

of delegates chosen at a private caucus over one popularly elected through a primary); *La Follette*, 450 U.S. at 107 (upholding the right of delegates to exercise independence and to not vote in accordance with primary results). Respondents also overlook that *Jones* explicitly refers to the holding in *La Follette* on this very point, making it clear that *Jones* cannot be read as mandating a primary where the State has adopted a convention. *See Jones*, 530 U.S. at 576; *see also id.* at 573 n. 5.

Nor does Respondents' reliance on isolated excerpts from *Eu* and *Tashjian* regarding divergence of views between political parties and their members even remotely support the conclusion that rank-and-file party members have a First Amendment right to unmediated access to voters. *See* Resp. Br. at 21-22. Respondents cite to *dicta* in *Eu* where this Court, not surprisingly, rejected the State's argument that alleged consent by political parties to the endorsement ban indicated that rank-and-file members had also consented to the ban. *See id.* at 21. Their reliance on *Eu* is, to say the least, ironic because *Eu* champions the First Amendment rights of the parties and their leadership not the rank-and-file.[6] In fact, in *Eu*, there was no concern that rank-and-file party members would be deprived of having input or any role in decisions by party leaders concerning whom to endorse.

Also surprising is Respondents' reliance on *Tashjian*, which they cite for the proposition that party members' associational rights – *separate and apart* from the associational rights of the party *qua* party – are at their "zenith" in the nomination process, and suggest that party members may not have their right to a direct say in the nomination

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[6] Respondents state that "New York vests local party leaders with power, when it serves their parochial interests, to cross-endorse candidates of rival political parties without the members' participation or consent." *Id.* at 23 (citations omitted). However, in fact, cross-endorsements are voted upon by duly elected delegates at the judicial nominating convention who serve as party representatives for the members in their assembly districts. JA 1938.

process diluted. *See id.* at 22; *see also id.* at 17. But the facts of *Tashjian* sharply undercut Respondents' argument, as the Court there upheld the right of the party leadership to enact a rule, without any ratification by party members, opening its partisan primary to independent voters. 479 U.S. at 208. In *Tashjian*, the party itself, acting through its leadership, chose to open the primary. *Id.* at 212. This action by the party leaders was upheld even though it arguably diluted the influence of rank-and-file party members in the primary. Thus, *Tashjian* confirms the rights of parties themselves.[7]

Properly read, *Jones*, *Tashjian* and *Eu* powerfully demonstrate that the First Amendment safeguards the right of association of a political party as exercised through its leadership. In each case, state statutes fell because they tread on the prerogatives of political party leadership – in *Jones*, to preserve a closed primary; in *Tashjian*, to open the party's closed primary; and in *Eu*, to endorse candidates. Here, where both the state statutes and the interests of the parties are aligned in support of New York's judicial convention system, *Jones*, *Tashjian* and *Eu* – especially when read together with *Cousins* and *La Follette* – fully support the system's constitutionality, despite the fact that party leadership choices may well diverge from those of rank-and-file members.[8]

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[7] The Court's decision in *Clingman v. Beaver*, 544 U.S. 581 (2005), in which the Court upheld a disaffiliation statute that banned political parties from opening their primaries to members of other parties, is beside the point here. *Clingman* did not deal with the right of party members to associate with *each other*, but rather the right of party members to associate with members of *another party*. *Clingman* is distinct from *Tashjian*, which involved the right of party members to associate with *independents*.

[8] Contrary to Respondents' statement that "county leaders are not elected by party members," Resp. Br. at 23 n. 5, party leaders are, in fact, elected officials who are regularly accountable to their constituents. District leaders are elected in a primary every two years by enrolled voters residing in the Assembly District. Tr. 40:16-41:14 (Berger). If rank-and-file party members are dissatisfied with a district leader's performance, they can replace that individual, which occurs frequently. *See* Tr. 2037:23-2038:5 (Allen); *see also* Tr. 1671:23-1672:8 (Kellner); Tr. 1331:16-1332:4 (Ward).

(Continued on following page)

B. THE JUDICIAL NOMINATION SYSTEM DOES NOT ABRIDGE THE PURPORTED RIGHT OF THE PARTY RANK-AND-FILE TO ASSOCIATE WITH CANDIDATES

Respondents argue that the judicial convention system imposes severe burdens on the purported First Amendment rights of party rank-and-file to associate with candidates of their choice, and, thus, requires strict scrutiny under *Bullock* and *Lubin*. But Respondents' argument is flawed because their burdens analysis rests on the unstated and erroneous premise that the Second Circuit properly extended *Storer's* reasonably diligent independent candidate test to require that challenger candidates within the party must have either (i) direct access to voters or (ii) a right to win.

Citing *Storer* without any discussion let alone defense of its application, Respondents claim that insurgent candidates are denied "access altogether," Resp. Br. at 25, when such burdens are viewed from the perspective of "whether challenger candidates have 'only rarely' succeeded in being considered by the voters," *id.* at 28 (citing *Storer*, 415 U.S. at 742).[9] Of course, whether challenger candidates have only

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County leaders are equally accountable, as they are themselves duly elected district leaders who have been selected by the other district leaders to serve in that capacity. HE 26 (NYCDC Rules, Art. III, ¶ 4(a)).

[9] Hunting for support for the Second Circuit's "challenger candidate" paradigm, *see* Pet. Br. at 28, Respondents rely on wholly inapposite cases – *Randall v. Sorrell*, 126 S.Ct. 2479 (2006) and *Buckley v. Valeo*, 424 U.S. 1 (1976) – from the campaign contribution context. *See* Resp. Br. at 28 n. 11. Those cases simply distinguished "challengers" from incumbents – a bright line to be sure. In contrast, the Second Circuit's "challenger candidate" involves the murky distinction between those candidates who are favored by party leadership and those who are not. *See* Pet. App. 59-61. Moreover, the Second Circuit's static view takes no account of the fluid realities of political campaigns where the fortunes of candidates and the support of party leaders frequently and abruptly change, particularly towards the end where astute politicians quickly jump on the bandwagon of the likely winner. As county leader Farrell described the process, "[i]t's almost like picking the winner of a horse race after the race." Tr. 1663:15-22 (Kellner); *see generally* Pet. Br. at 28

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"rarely succeeded" in being considered by voters is thinly-veiled code for whether the electoral system in question is a direct primary. *See, e.g., id.* at 28 (complaining "the statutes lock out rank-and-file members and their candidates" from the nominating process); *id.* at 26-27 (challenger candidates are excluded from the nomination process regardless of "how broad or enthusiastic their popular support") (internal quotations and citations omitted). Indeed, Respondents claim that the system imposes severe burdens because it is impossible for an individual judicial candidate to assemble and run a slate of pledged delegates. *See id.* at 25. But, again, running slates of delegates pledged to an individual candidate is the functional equivalent of giving voters a direct "voice" in choosing the nominee. *See* Pet. Br. at 29. Consequently, Respondents' argument that *Bullock* and *Lubin* require strict scrutiny is predicated on the misapplication of *Storer* as requiring a right to a direct primary. *See* Resp. Br. at 29.

Respondents nevertheless claim that, contrary to *Bullock* and *Lubin*, "Petitioners contend that the State's uniform exclusion of challengers at the nomination stage is not of constitutional dimension." *Id.* But this is a gross mischaracterization of Petitioners' position, as Petitioners agree that there is state action here. *See* Pet. Br. at 27. Under *Bullock* and *Lubin*, where there is state action, the Fourteenth Amendment prohibits exclusion of candidates based on invidious discrimination such as by wealth. No such discrimination is present here, and, without it, neither of these cases require strict scrutiny.

Nor are "challenger" candidates "excluded" from the nomination process. Properly viewed, the equivalent of ballot access in a convention context can only mean having a chance to put one's name up for consideration by the delegates at the nominating convention. But Respondents contend that, even when measured by this standard,

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and n. 14 (discussing insurgent candidates who won the nomination despite being initially opposed by party leaders).

challenger candidates do not have an opportunity to access the system because they have "no actual opportunity to lobby delegates" without party leader support. *See, e.g.*, Resp. Br. at 31 (quoting Pet. App. 18). Of course, Respondents still mean – as the Second Circuit did, again, based on its distorted application of *Storer* – that challenger candidates have no ability to successfully lobby enough delegates to *win* their party's nomination. However, as lead plaintiff Lopez Torres well demonstrates, judicial candidates do have an opportunity to lobby delegates. Indeed, Lopez Torres actually garnered substantial delegate support; she simply did not win. Tr. 612:9-615:11 (Lopez Torres).

Ironically, Respondents' focus on electoral success as the yardstick for measuring constitutionally sufficient convention access also contradicts Respondents' principal argument that this case does not involve autonomous party conduct. While Respondents acknowledge that there is no right to win, they cleverly assert that nevertheless "candidates and their supporters within a party do have a right to be free from a state-mandated process guaranteeing that they will lose." Resp. Br. at 21. But Respondents cannot have it both ways, arguing on the one hand that the statutes themselves guarantee that challenger candidates will lose, and on the other, that party leaders are responsible for convention outcomes. Similarly, even if delegates were not open to persuasion in the lobbying process, as Respondents claim, *see id.* at 31, that is not a feature of statutory design, but of party politics.

III. RESPONDENTS' ARGUMENTS WOULD EVISCERATE *WHITE*, *COUSINS* AND *LA FOLLETTE* AND JEOPARDIZE THE CONTINUED USE OF DELEGATE-BASED NOMINATING CONVENTIONS

Faced with this Court's holding in *White* that a convention can be a constitutional alternative to a primary, Respondents attack a straw man argument they wrongly attribute to Petitioners, namely, that all forms of "indirect"

democracy (*i.e.*, conventions) are *per se* constitutional. *See* Resp. Br. at 36. Actually, Petitioners make a very different point. *White* would be rendered meaningless – as would *Cousins'* and *La Follette's* vindication of delegate-mediated conventions[10] – if a convention must be equivalent to a primary in order to be constitutional; yet this is what the Second Circuit and Respondents wrongly conclude.

Respondents quote *Republican Party of Minnesota v. White*, 536 U.S. 765, 788 (2002), to the effect that the state must accord participants in the electoral process "the First Amendment rights that attach to their roles." *See* Resp. Br. at 35. Yet they utterly fail to address the roles actually assigned to participants in the judicial convention system. Instead, Respondents focus on the absence of a role for voters at the convention stage even though the role assigned to voters occurs earlier at the delegate primary (and later at the general election). This is, of course, how any true delegated-mediated convention operates. Respondents also assign a role to judicial candidates at the delegate selection stage that does not belong to them under the design of the system – namely, running slates of pledged delegates. *See* Pet. Br. at 29-30. Again, Respondents' fixation on pledged delegates simply reflects their desire that voters be given a direct "voice" in selection of the party's nominee. *See* Resp. Br. at 25. Assessed from the standpoint of each participants' intended role in the process, the system imposes minimal burdens and clearly passes constitutional scrutiny, as discussed in Petitioners' Opening Brief at 22-23 and 41-43.

Although Respondents claim that the decision below does not cast doubt on the continued use of conventions, under the sweep of Respondents' logic, conventions that involve candidate selection by delegates rather than voters – in other words, true conventions – would be rendered unconstitutional. *See* Resp. Br. at 44-45. Indeed, Respondents' effort to characterize New York's convention system

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[10] *See also Timmons*, 520 U.S. at 355 n. 4 (recognizing party's right to select standard bearer through means other than primary).

as an isolated anomaly as compared to all other conventions is based on meaningless distinctions. *See id.* at 44. While Respondents argue that national party conventions are not "germane" because they are "created by the parties' own rules," *id.* at 43, as discussed above, key aspects of the judicial nominating system are effectuated by parties following their own party rules. As for the four conventions allegedly distinct from New York's because they "give parties significant autonomy" in structuring their conventions, *id.* at 44, those statutes, like New York's, authorize the general framework for a convention and leave important aspects to the parties' discretion. Nor do Respondents identify any constitutionally significant differences between New York's convention and the seven conventions governing mid-term vacancies or the 17 conventions governing minor party nominations. *Id.* All of these conventions are delegate-based conventions and, certainly, they cannot be discounted by suggesting that First Amendment rights are less weighty in the context of mid-term vacancies or minor parties as opposed to major parties.[11] Lastly, Respondents' assertion that seven conventions do not relate to political office, *id.*, is simply incorrect, as these conventions nominate candidates for Electors, who cast ballots for the President and Vice-President of the United States. U.S. Const. art. II, §1 cl. 3.

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[11] Respondents rely on *Rodriguez v. Popular Democratic Party*, 457 U.S. 1 (1982), to argue that conventions to fill vacancies are justified because the state has a "compelling interest" to fill such vacancies before the general election. Resp. Br. at 44. But *Rodriguez*, in fact, found the convention system constitutional because (i) its effect on citizens' rights to select their representatives was "minimal," 457 U.S. at 12; (ii) the State's interest in filling the vacancy without a mid-term election was "legitimate," *id.*; and (iii) the convention was "not unreasonable," *id.* at 13. In short, the convention system in *Rodriquez* satisfied rational-basis scrutiny, as would New York's judicial convention. Likewise, *White* did not suggest that States have a greater interest in imposing conventions on minor parties than major parties, *see* Resp. Br. at 44, but simply held that States may require any party to demonstrate some modicum of popular support before they may place a candidate on the general election ballot. 536 U.S. at 783.

Further, Respondents' argument that many other conventions are "structured to enhance the ability of rank-and-file party members to express their nomination preferences," Resp. Br. at 45, again, makes clear their desire to replace New York's convention system with a primary. Tellingly, Respondents offer as examples of purportedly constitutional conventions, Michigan, where *all* Democratic Party members supposedly can vote in the convention, and Alabama, which provides for primaries as a default nominating system. *See id.* at 45 n. 22. Respondents simply cannot conceive of any constitutional nominating process other than direct appointment or a primary (or its equivalent). *See id.* at 26 ("If New York believes that such a fundamental exercise in democracy adversely affects the judiciary, the answer is to opt for an appointive bench"); *id.* at 35-36 ("the greater power to dispense with elections altogether does not include the lesser power to assign roles to party members that exclude them from their own party's nomination process") (citations and quotations omitted).

Finally, Respondents do not refute that if some form of a true delegate convention must be constitutionally permissible, as *White* requires, then New York's chosen electoral system should not have been completely dismantled and replaced with a primary. Respondents' only argument in support of such a drastic remedy is that the district court did not usurp legislative authority, but merely deferred to the statutory default provision of a primary for other public offices and left open the possibility for the Legislature to enact a new statute, including the passage of a convention. *Id.* at 48-49. Not only do the statutes at issue here not contain a primary default, but Respondents entirely ignored this Court's directive in *Ayotte v. Planned Parenthood of Northern New England*, 546 U.S. 320 (2006), that the remedy should have been narrowly tailored to fit the purported constitutional defect in light of legislative intent to replace New York's failed experiment with judicial primaries with judicial conventions. Without disputing the principle that the considered judgment of a state legislature is entitled to deference,

Respondents resort to characterizing passage of the judicial nominating statutes as a surreptitious affair conducted in the dark of night. *See* Resp. Br. at 46-47. Regardless of the hour, the act of passing the legislation was no less the act of the Legislature. Respondents simply ignore all subsequent history regarding the statutes and the number of occasions spanning several decades in which the Legislature determined to preserve the convention system after serious debate. *See id.* at 47.

CONCLUSION

For the foregoing reasons, and those set forth in Petitioners' Opening Brief, this Court should reverse the United States Court of Appeals for the Second Circuit.

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